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No. 94-1661

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ASHLAND INC.,

Petitioner,

v.

REVENUE CABINET,
COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

REPLY BRIEF FOR THE PETITIONER

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In its response to our petition, the State of Kentucky diligently defends a proposition that is not at issue in this case -- namely, that a state may impose a "compensating" use tax on the one-time event of the use in the state of an item purchased in another state. Claiming that this proposition is "straightforward" (Br. in Opp. 5), the State asserts that several state courts have upheld the imposition of such taxes on an unapportioned basis and that this Court's decision in

Oklahoma Tax Commission v. Jefferson Lines, Inc., No. 93-1677 (Apr. 3, 1995), is not inconsistent with those decisions.

The difficulty with the State's response is that it does not address the question presented in this case, which does not involve a tax imposed on a one-time event or one that is associated with a purchase in another state. Rather, it involves a tax imposed *on a recurring basis* on the use or storage in Kentucky of items leased in another state. The court below has held that Kentucky can tax the entire value of each periodic lease payment, without apportionment, despite the recurring nature of the tax and the undisputed fact that the aircraft are used and stored for significant periods outside of Kentucky.

That decision is at odds with the principles recently explicated by this Court in *Jefferson*. As we noted in our petition (at 13), the Court ruled that ordinary apportionment principles do not apply to sales taxes because a sale is a "discrete event" (slip op. 11) that is completed at one time and that is "properly treated as unique" (*id.* at 13). The Court's mention of use taxes, which the State relies upon in its response (at 6), referred only to use taxes that are intended "to compensate the taxing State for its incapacity to reach the corresponding *sale*" and therefore are "paired with a *sales* tax." Slip op. 19 (emphasis added). Arguably, such a tax also is imposed on a "discrete event"; the activity being taxed is complete as soon as there is a single in-state use following an out-of-state sale.

But nothing in *Jefferson* supports disregarding apportionment principles in the case of a tax imposed on a continuing basis on the storage and use of items leased in

another state. To the contrary, *Jefferson* indicates that apportionment is required in the case of the storage and use tax at issue here because the taxable activity and the event of taxation occur repeatedly over a period of years. The tax is not imposed on a "discrete event," and it plainly does not "reach[] only the activity taking place within the taxing State." *Id.* at 21-22. *See* Pet. 13-14.

The State's long list of cases from other state courts (Br. in Opp. 8-9) is irrelevant for the same reason. These cases involve use taxes imposed on aircraft or other items *purchased* in other states. The courts viewed the cases as involving a one-time tax imposed as a substitute for a sales tax that would otherwise go uncollected. *See, e.g., Great American Airways v. Nevada State Tax Commission*, 705 P.2d 654, 657 & n.5 (Nev. 1985) (use tax designed "to prevent evasion of the state sales tax"). These cases shed no light on the issue presented here -- a recurring tax imposed upon periodic lease payments where the activity being taxed occurs in other states as well as in Kentucky.[1]

Indeed, to the extent state courts have focused on this distinction between one-time taxes on sales and recurring taxes on lease payments, they have recognized that the distinction may have constitutional significance. In a case recently before this Court, *Fleming Foods of Alabama, Inc. v. Department of Revenue*, 648 So. 2d 577 (Ala. 1994), 1994

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[1] One case cited by the State does involve leased aircraft, but in that case it appears that no activity occurred in other states and the taxpayer did not claim that the tax should be apportioned. *Seaboard World Airlines, Inc. v. New York State Tax Commission*, 118 A.D.2d 947, 948, 499 N.Y.S.2d 513, 515 (A.D. 3d Dept. 1986).

Ala. LEXIS 456, *cert. denied*, No. 94-1226 (Apr. 17, 1995), the state court rejected a constitutional challenge to the imposition of use tax on vehicles purchased in another state. The court emphasized, however, that "[t]he use tax is not a recurring annual tax, but is a one-time tax levied at the same rate as the sales tax and is complementary to the sales tax." 1994 Ala. LEXIS, at *7.

In sum, *Jefferson* holds that the "unique" nature of sales taxes excuses them from the apportionment requirement applicable to most other taxes. Whether or not that holding extends to a use tax imposed, as a complement to a sales tax, on the "discrete event" of the single use of an item purchased in another state is not pertinent here. With respect to the question that is presented by this case -- a recurring tax on the activity of storage and use of leased property -- *Jefferson* indicates that the apportionment requirement cannot be disregarded. As discussed in our petition (at 8-10), Kentucky's unapportioned tax on the storage and use of leased property violates the constitutional limitations on taxation of interstate activity set forth in prior decisions of this Court and reconfirmed and elucidated in *Jefferson*. *See Jefferson* slip op. 24-25; *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 290-91 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626-27 (1981). The court below did not address these constitutional difficulties, and its decision should not be allowed to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider vacating the judgment below and remanding for reconsideration in light of its decision in *Oklahoma v. Jefferson Lines, Inc.*, No. 93-1677 (Apr. 3, 1995).

Respectfully submitted,

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